

DEC 9 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-617

TERMINAL-HUDSON ELECTRONICS, INC.,
OF CALIFORNIA, dba OPTI-CAL,
Petitioner,

VS.

ROBERT O. DUNDAS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal
of the State of California, Fourth Appellate District

**BRIEF FOR ALL RESPONDENTS EXCEPT CALIFORNIA
BOARDS OF OPTOMETRY AND MEDICAL EXAMINERS
IN OPPOSITION**

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OPINIONS BELOW

None of the opinions in this cause have been reported.

JURISDICTION

The opinion of the Court of Appeal of California, Fourth Appellate District, was filed on June 24, 1977, affirming the civil judgment of the Superior Court of Orange County in favor of respondents (plaintiffs and plaintiffs-in-intervention) of February 6, 1976. On July 12, 1977, the Court of Appeal denied a Petition for Rehearing. Thereafter, on August 18, 1977, the Supreme Court of California denied a Petition for Hearing. On October 19, 1977, petitioner filed in the Court of Appeal of California, Fourth Appellate District, Second Division, a Notice of Appeal to this Court. On October 27, 1977, petitioner filed its Petition for Writ of Certiorari, attempting to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(2).

QUESTION PRESENTED

Whether the use of the word "near" in California Business and Professions Code Section 2556 renders that statute unconstitutionally vague as applied to an optician who maintained optometrists in offices that were either a part of, or contiguous to, the optician's offices.

STATUTE INVOLVED

The only statute challenged by the Petition is California Business and Professions Code Section 2556, governing registered dispensing opticians, which states in pertinent part:

"It is unlawful to do any of the following: . . . to directly or indirectly, employ or maintain on or near the premises used for optical dispensing . . . an optometrist . . . for the purpose of any examination or treatment of the eyes . . ."

STATEMENT OF THE CASE

Respondents are thirty-four licensed optometrists who practice in or around Orange County, California. On September 24, 1971, they commenced an action for injunctive relief against petitioner (defendant below), a corporate chain registered dispensing optician. The action challenged numerous violations of California Business and Professions Code Section 2556 which forbids opticians

". . . to directly or indirectly, employ or maintain on or near the premises used for optical dispensing . . . an optometrist . . . for the purpose of any examination or treatment of the eyes . . ."

Subsequently, respondents, California State Boards of Optometry and Medical Examiners (now entitled Board of Medical Quality Assurance), were allowed to intervene as plaintiffs.

After trial, the Superior Court of Orange County made numerous findings of fact. On appeal to the California Court of Appeal, Fourth Appellate District, those findings were summarized in the Court's decision, which affirmed the judgment of the Superior Court (see pp. 2-3 of the Opinion, attached as Appendix A to the Petition):

"The evidence disclosed, and the trial court found, that defendants established offices to sell glasses in shopping centers, then partitioned off a portion of the premises for optometrists' offices. Defendants completely furnished the offices of the optometrists with equipment and used strawmen to sublease the offices to the optometrists. Defendants exercised complete control of the optometrists. Defendants made appointments for them and advertised for them. The optometrists filed daily reports with and had their working hours approved by the defendants. Sometimes defendants' employees answered the telephone for the optometrists and on one occasion defendants cancelled an optometrist's lease when he took an unauthorized vacation. Defendants charged nominal or no rental for these fully-equipped optometrists' offices and further provided the optometrists with a guarantee of up to \$30,000 per year to be offset by eye examination fees collected by the optometrists. Not surprisingly, the trial court found that defendants' activities violated Business & Professions Code Section 2556 and Civil Code Section 3369 and enjoined defendants from doing so. In substance, the trial court enjoined the defendants from (1) employing or maintaining an optometrist in or near the premises used for optical dispensing

in violation of Section 2556 of the Business & Professions Code; and (2) engaging in unfair competition within the meaning of Civil Code Section 3369(3) by performing any or all of the above acts."

The California Supreme Court then denied petitioner's request for a hearing.

ARGUMENT

Petitioner's only contention appears to be that Section 2556 is unconstitutionally vague as applied to it in this action. This contention is patently frivolous.

The Court of Appeal noted (see pp. 6-7 of Appendix A to the Petition) that the evidence clearly demonstrated that petitioner maintained optometrists in offices that were either next door to petitioner's offices or were only separated from them by a partition. Certainly a person of ordinary intelligence would know beyond a shadow of a doubt that the term "near" applied to such a context. Since the statute is not vague as applied to petitioner, petitioner lacks standing to challenge its potential application in other situations. E.g., *United States v. Raines*, 362 U.S. 17, 21-22, 80 S.Ct. 519, 523, 4 L.Ed. 2d 524, 529-530 (1960). Therefore, the decision of the Court of Appeal is clearly in accord with the applicable decisions of this Court and the Petition should be denied.

CONCLUSION

The opinion of the Court of Appeal thoroughly considered petitioner's contention and found it wanting. That decision clearly conforms to settled principles of constitutional interpretation established by this Court. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, December 2, 1977.

Respectfully submitted,

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